No. 76-1536

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

KABUA KABUA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Acting Assistant Attorney General,

RAYMOND N. ZAGONE,
JACQUES B. GELIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-8a) is reported at 546 F. 2d 381.

JURISDICTION

The judgment of the Court of Claims was entered on December 15, 1976. A timely motion for rehearing *en banc* was denied on February 4, 1977 (Pet. App. 9a). The petition for a writ of certiorari was filed on May 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a suit filed in 1975 in the Court of Claims under the Tucker Act on behalf of former inhabitants of a Micronesian island seeking recovery against the United States for an uncompensated taking is barred by that

court's six-year jurisdictional statute of limitations, where the complaint alleges that in 1960 the Army took exclusive control of the island and removed all natives in connection with the establishment of a missile range.

STATUTE INVOLVED

The statute of limitations for the Court of Claims, 28 U.S.C. 2501, provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT

Petitioners represent that they are indigenous landowners of the 400-acre island of Roi-Namur in Kwajalein Atoll in the Marshall Islands, a part of Micronesia. They sued the United States in the Court of Claims under the Tucker Act, 28 U.S.C. 1491, to recover for an alleged uncompensated taking of that island. The Court of Claims, in an opinion on which we rely (Pet. App. 1a-8a), held that it lacked jurisdiction because petitioners' claims were barred by that court's six-year statute of limitations, 28 U.S.C. 2501.

Briefly, the facts, as stated by the Court of Claims, are as follows: In 1947 the United States assumed administration of Roi-Namur under a Trusteeship Agreement with the United Nations, 61 Stat. 3301. At the time the island was uninhabited and had been since the Japanese expelled the natives during World War II (Pet. App. 1a-2a).

In 1953, the High Commissioner of the Trust Territory issued Regulation No. 1, providing for the adjudication of claims to ownership of lands occupied by the United States or the Government of the Trust Territory. Section

3 of the Regulation authorized an appropriate official to release to the owner any part of private land that was no longer needed by the United States (Pet. App. 3a).

On May 6, 1960, the High Commissioner executed a Use and Occupancy Agreement with the United States, by which the United States, in return for a payment of $80,000, was allowed to occupy the island. Shortly thereafter, the United States Army took control of Roi-Namur and removed a small number of natives who had been allowed to return to Roi-Namur since 1948. Since 1960, no Marshallese person has been allowed to reside on or use Roi-Namur. The Army has now installed approximately $100 million worth of buildings and improvements on the island for the Kwajalein Missile Range (Pet. App. 2a).

In November 1962, and again in March 1964, the Trust Territory Government published notices stating that it considered Roi-Namur public land owned by the Trust Territory Government, but inviting the submission of private claims. Petitioners filed claims with the Land Management Administration under Regulation No. 1 in 1963 and 1964, asserting that the land granted to the United States was private property, not in the public domain, and thus not subject to the disposition of the Trust Territory Government. The Land Management Administration determined that the petitioners had certain rights to the property. By letter to the High Commissioner of the Trust Territory, dated December 1, 1965, the petitioners agreed to allow the United States to remain in undisturbed possession of the land, pending negotiations for compensation. Nearly ten years later, on April 15, 1975, after petitioners had become convinced that negotiations would be unavailing, they filed the instant suit (Pet. App. 3a-4a).

On cross-motions for summary judgment, the Court of Claims dismissed the petition on the ground that, since

the suit had not been filed within six years after the claim accrued, jurisdiction of the claim was barred by 28 U.S.C. 2501.

ARGUMENT

1. In 1960, the Government of the Trust Territory sanctioned the continuing occupancy of Roi-Namur by the United States, in return for the payment of $80,000, and the Army removed all natives in preparation for construction of the Kwajalein Missile Test Range. Thus it is undisputed that the Army had occupied the island exclusively and adversely long in excess of six years when petitioners filed suit in 1975.

Petitioners attempt to avoid the bar of 28 U.S.C. 2501 by reliance on *United States* v. *Dickinson*, 331 U.S. 745, and *Castro* v. *United States*, 500 F. 2d 436 (Ct. Cl.). *Dickinson* held that, where the government's construction of a dam caused an abutting landowner's property to become gradually flooded, the taking was not complete—and therefore the statute of limitations did not begin to run—until the inundation had stabilized. As the Court of Claims correctly recognized, this Court in *United States* v. *Dow*, 357 U.S. 17, limited *Dickinson* to cases where a taking is accomplished in successive and uncertain stages over a period of time. See 357 U.S. at 27. *Castro* likewise involved "a temporary taking for varying and different temporary reasons" (Pet. App. 5a). Here, in contrast, the Army occupied the island in a single event in 1960 and constructed $100 million worth of facilities thereon for the missile range. Had suit been filed in 1960, the remote possibility of reverter upon the termination of the missile range would not have impeded the prompt ascertainment of petitioners' rights.

As the Court said in *Dow*, "[t]he usual rule is that if the United States has entered into possession of the property

prior to the acquisition of title, it is the former event which constitutes the act of taking. It is that event which gives rise to the claim for compensation * * *." 357 U.S. at 22.

Neither the administrative land title proceedings nor subsequent settlement negotiations (Pet. 17-19) tolled the statute. *Soriano* v. *United States*, 352 U.S. 270, 274-275; *Camacho* v. *United States*, 494 F. 2d 1363, 1369-1370 (Ct. Cl.).

2. Petitioners' claim (Pet. 13-14) that the decision below conflicts with the Trust Territory Code depends, as petitioners acknowledge, on reading the decision below as treating the United States as "having ownership" of the island of Roi-Namur. But the United States neither has (nor asserts) fee ownership to Roi-Namur, or any other part of Micronesia. In accepting trusteeship, the United States made it clear that it did not accept sovereignty over the islands. 16 Dep't. State Bull. 416, 417 (1947); see *Porter* v. *United States*, 496 F. 2d 583, 588 (Ct. Cl.). This disavowal of sovereignty accords with the accepted view of trust territories under international law: "[W]herever sovereignty does rest [with respect to the trust territories] it is not with the administering power." Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 Am. J. Int'l. L. 263, 271 (1948). The Court of Claims decision does not assume otherwise.

Petitioners argue (Pet. 12) that the decision allows the United States to "create a claim of right for itself against the beneficiaries of its trust by the simple expedient of conveying use and occupancy from one of its instrumentalities to another." But the limit of any trust relationship depends wholly upon a statute, treaty, or executive order; a fiduciary duty does not exist in the abstract. *Skokomish Indian Tribe* v. *France*, 269 F. 2d 555, 560

(C.A. 9); *Sac and Fox Tribe* v. *United States*, 383 F. 2d 991, 1001 (Ct.Cl.) (and cases therein cited). Thus, the general statement in Article 6 of the Trusteeship Agreement (Pet. App. 12a) directing the United States, as administering authority, to "protect the inhabitants against the loss of their lands and resources" must be read in conjunction with the specific direction in Article 5, that the administering authority is entitled:

> 1. to establish naval, military and air bases and to erect fortifications in the trust territory;
>
> 2. to station and employ armed forces in the territory. [Pet. App. 11a.]

Military use of the island (for which the United States paid the Trust Territory Government $80,000) is altogether proper. As a result of negotiations or special congressional action former residents may yet receive additional sums. The point remains, however, that Congress has limited the jurisdiction of the Court of Claims to claims filed within six years after they have accrued, and thus "the Tucker Act * * * just simply is not an implement suited to [petitioners'] need" (Pet. App. 8a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JAMES W. MOORMAN,
Acting Assistant Attorney General.

RAYMOND N. ZAGONE,
JACQUES B. GELIN,
Attorneys.

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